

June 22, 2015
OPINION 15-0019

Stephanie Bond Hulett
City Attorney
P.O. Box 1629
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71-1-1 MUNICIPAL FIRE & POLICE CIVIL SERVICE
90-A POLITICAL SUBDIVISIONS- Officers, Agents,
Employees

La. R.S. 33:2537 La. R.S. 33:2560
La. R.S. 33:2566 La. R.S. 42:263
La. R.S. 33:2540

Dear Ms. Hulett:

Relates to the authority of the Denham Springs City's Fire &
Police Civil Service Board to employ independent legal counsel.

On behalf of the City of Denham Springs (City),¹ you have requested an Attorney General's opinion regarding the power of the City's Fire & Police Civil Service Board (Board) to employ independent legal counsel. You pose a number of questions which will be answered in the order they were presented.

BACKGROUND

The City has a population of 10,215.² Accordingly, the Fire & Police Civil Service law for small municipalities, found at La. R.S. 33:2531 *et seq.*, applies to the Board.³

City Police Officer (Officer K) was terminated by the Mayor of the City. Officer K appealed his termination to the Board and an appeal hearing was set. As a result, the Board retained Attorney H to provide independent legal representation and assist the Board with the appeal hearing.

Subsequent to Officer K's appeal hearing, the Board received a written request from Officer K's attorney to investigate allegations of misconduct that Officer K made against a Police Captain. Although Officer K's allegations were only against the Captain, the Board investigated both the Police Captain and the Police Chief. The Board held pre-

¹ Ms. Paeton L. Burkett, as the former Attorney for the City, submitted this request on behalf of the City.

² 2010 US Census available at <http://quickfacts.census.gov/qfd/states/22/2220435.html> (last visited 6/4/2015).

³ La. R.S. 33:2531 *et seq.* applies to all municipalities having a population of not less than seven thousand and not more than thirteen thousand, according to the last preceding decennial census of the United States. La. R.S. 33:2531.

disciplinary hearings on both officials. The Board again retained Attorney H to assist and advise the Board during the investigation and pre-disciplinary hearings.

1. Is the Board authorized to conduct pre-disciplinary hearings?

Your request states that it is common practice for the appointing authority to conduct pre-disciplinary hearings and issue disciplinary actions. Subsequently, pursuant to La. R.S. 33:2561, the employee can appeal that disciplinary action to the Board.

La. R.S. 33:2537(5) allows the Board to “[c]onduct investigations and pass upon complaints by or against any officer or employee in the classified service for the purpose of demotion, reduction in position or abolition thereof, suspension, or dismissal of the officer or employee....”

In addition, La. R.S. 33:2560 provides for corrective and disciplinary actions by the Board. Specifically, Section C provides in pertinent part, as follows:

Although it is incumbent upon the appointing authority to initiate corrective or disciplinary action, the board may, and shall upon the written request of any qualified elector of the state which sets out the reasons therefor, make an investigation of the conduct and performance of any employee in the classified service and, thereupon, may render such judgment and order action to be taken by the appointing authority. Such action shall be taken forthwith by the appointing authority.

Thus, pursuant to La. R.S. 33:2537(5) and La. R.S. 33:2560(C), the Board is authorized to conduct investigations, hold pre-disciplinary hearings and issue an order to the appointing authority to carry out corrective or disciplinary actions. This conclusion is supported by La. Atty. Gen. Op. Nos. 98-51 and 03-0205A, which opined that the proper body to investigate the conduct of police employees under civil service is the Civil Service Board.⁴

2. Is the Board required to get approval from the City Council prior to hiring independent counsel under La R.S. 33:2566?

La. R.S. 33:2566 authorizes the Board to employ independent legal counsel, providing, in pertinent part:

If this Part or its enforcement by the board is called into question in any judicial proceedings, or if any person fails or refuses to comply with the lawful orders or directions of the board, the board may call upon the attorney general, or the chief legal officer of the municipality, parish or fire

⁴ Specifically, La. Atty. Gen Op. No. 03-0205A rejected the “the typical procedure” in which a disciplinary proceeding is only initiated by the appointing authority and the Board thereafter determines whether the appointing authority acted in good faith for cause.

protection district under which the fire and police service functions or may employ independent counsel to represent it in sustaining this Part and enforcing it.

This statute does not require the Board to obtain approval from the City Council before hiring independent legal counsel.⁵

3. Is the Board required to get approval from the Louisiana Attorney General prior to hiring independent counsel pursuant to La. R.S. 42:263?

La. R.S. 42:263 requires local boards to seek the approval of the Attorney General prior to retaining or employing any special attorney or counsel to represent it. The Board is subject to this provision because it is a local board. In particular, Section (A) provides that the Board must pass a resolution stating that a real necessity exists for the retention of special counsel, the reasons for the action, and the compensation to be paid. The resolution is “subject to the approval of the attorney general and, if approved by him, shall be spread upon the minutes of the body and published in the official journal of the parish.” La. R.S. 42:263.

La. R.S. 42:263, however, does not preclude the Attorney General from granting his approval even after the legal services were rendered. To this end, La. R.S. 42:264 states that “the Attorney General may approve the employment and payment of compensation retroactively where the failure to comply with this Section was inadvertent and was in good faith.”

Therefore, pursuant to La. R.S. 42:263(A) and La. R.S. 42:264, the Board is required to obtain the approval of the Attorney General prior to hiring independent counsel; however, such approval for employment and payment for compensation may also be granted retroactively, provided that the failure to obtain the required authorization was inadvertent and in good faith.

4. Can the City Council establish a limit on the dollar amount that may be appropriated to the Board each time they hire independent counsel pursuant to La. R.S. 33:2540?

La. R.S. 33:2540 provides for funding of the Board, and states in pertinent part:

The governing body of the municipality, parish or fire protection district, as the case may be, shall make adequate annual appropriations to enable the board thereof to carry out effectively the duties imposed upon the board and shall furnish the board with office space, furnishings, equipment, and supplies and materials necessary for its operation. (Emphasis added).

⁵ La. Atty. Gen. Op. No. 03-0306.

In La. Atty. Gen. Op. 92-666, this office observed that the governing body of the Board is required by law to provide the Board with adequate funding to facilitate the Board in carrying out its duties, including funds to pay the fees of outside counsel hired by the Board. There, we observed that since La. R.S. 33:2566 authorizes the Board to hire independent counsel, the Board has the discretion to agree to fees and other terms involved in the attorney-client relationship. As such, it appears to this office that since the City is required to make “adequate annual appropriations,” it would not be permitted to dictate any terms of the Board’s contracts with outside counsel or to establish a limit on the dollar amount that may be appropriated to the Board each time it hires independent counsel.⁶ Note, however, that “[a]ttorney fees cannot be excessive and are subject to review and control by the courts to determine reasonableness.” La. Atty. Gen. Op. No. 92-666.

5. Is assisting the Board with an appeal hearing or an investigation of an employee an appropriate occasion for the Board to employ independent counsel pursuant to La. R.S. 33:2566?

As noted above, La. R.S. 33:2566 authorizes the Board to employ independent legal counsel at judicial proceedings. However, in accordance with La. R.S. 33:2537(1), one of the main duties of the Board is to “[r]epresent the public interest in matters of personnel administration.” Such representation certainly involves the determination of the legal consequences of the Board’s actions, before and after a legal proceeding is instituted. In La. Atty. Gen. Op. No. 03-0306, this office opined that “the employment of counsel to provide legal advice either on an ongoing basis or as counsel in judicial proceedings is necessary for the Board to accomplish ‘effectively the duties imposed upon the board.’” (Emphasis added).⁷

In the same vein, La. Atty. Gen. Op. No. 88-343 determined that “a local civil service board may, at its option, employ independent special legal counsel to represent and advise it on any matter within the scope of its functions.” Accordingly, it is our opinion that the Board is authorized to employ independent counsel to provide general legal advice, including assisting the Board with an appeal hearing.

Your request indicates that Officer K appealed his termination by the Mayor to the Board. Prior to the appeal hearing, the Board notified the Mayor, in writing, of its intention to hire special counsel. At the appeal hearing, Officer K, the Mayor and the Board were represented by their respective attorneys. Therefore, since the services of special counsel were for the purpose of assisting the Board to accomplish its statutory duties of representing the public interest in matters of personnel administration during

⁶ Note that in the event more funds than was budgeted by the City are needed, the Board will need to request an amendment to the budget. La. R.S. 39:1310.

⁷ La. Atty. Gen. Op. No. 03-0306 analyzed La. R.S. 33:2506, which authorizes the Civil Service Board in municipalities between 13,000 and 250,000 to employ independent legal counsel. La. R.S. 33:2506 contains verbatim language to the text found in La. R.S. 33:2566.

the appeal hearing, it is further the opinion of this office that his employment was appropriate under these circumstances.

6. If the Board employed independent counsel for a scope of representation that is not authorized or permitted under La. R.S. 33:2566, can the City seek reimbursement of those attorneys fees that have been paid to the independent counsel?

Since we conclude that the Board is authorized to employ independent special legal counsel for the Board to accomplish its statutory duties, the payment of reasonable and necessary attorney fees would also be authorized and no reimbursement would be owed to the City.

7. Is the City prohibited from paying the attorneys fees for the Police Captain and Police Chief incurred for their defense in the pre-disciplinary hearings in light of the fact that the Board investigation involved allegations where they were acting in the course and scope of their employment, there was no official finding of wrongdoing and they were ultimately exonerated.

In La. Atty. Gen. Op. No. 05-0377, this office observed that even when a police officer is not entitled to reimbursement under La. R.S. 42:1442 because the officer has not been subject to an institution of prosecution, if the officer or employee has been the subject of an investigation and/or prosecution of criminal charges arising out of the performance of the official functions of his office or employment, and the officer is exonerated, then the public body that employs that person may, but is not required to, pay the reasonable attorney's fees and expenses that result from the defense against the charges.

You do not indicate that criminal charges were involved in the civil service complaints made against the Captain and the Chief of Police. Nevertheless, we believe that a similar reimbursement doctrine would apply in the local civil service context.

This doctrine is based on R.S. 13:5108.1,⁸ which allows for reimbursement of attorney fees incurred by state officers on employees in connection with "any claim, demand, suit, complaint, or petition seeking damages filed in any court" that arises out of the discharge of official duties by the officer or employee. This office, in a series of opinions, concluded that this allowance extends to reimbursement of attorney fees incurred by state officers or employees in successfully defending themselves against ethics complaints,⁹ charges brought against judge by the Judicial Commission,¹⁰ and former charges of misconduct brought before the state Civil Service Commission,¹¹ none of which involved former judicial proceedings or criminal charges. This office has also

⁸ Note that by way of Act 65 of 2000, La. R.S. 13:5108.2 was repealed; however, such language relative to indemnification of state officers and employees was reenacted under La. R.S. 13:5108.1.

⁹ See, e.g., La. Atty. Gen. Op. Nos. 95-242 and 15-0016.

¹⁰ See, e.g., La. Atty. Gen. Op. No. 01-149.

¹¹ See, e.g., La. Atty. Gen. Op. No. 97-421.

observed that while R.S. 13:5108.1 does not provide specific statutory authority for such reimbursement for local officials, the doctrine is equally available to a local public body such that "in a situation where a public official employs an attorney because of allegations of misconduct relating to his work as a public official and where the official is found not guilty (or where no indictment results from an investigation), it is our opinion that the office holder may pay reasonable legal expenses from public funds."¹²

We explained our reasoning as follows:

"The basis for this permissive discretion is that public funds may be used though no legal obligation exists if a significant public purpose therefor does exist. Reimbursement of such **attorney fees** and costs of a local public official or employee who has been exonerated of allegations of fault or wrong doing in the performance of his duties encourages qualified individuals to seek or remain in public office or public **employment** and hence a local government entity such as a police jury may well in its discretion deem such reimbursement will serve a significant public purpose."¹³

Just as reimbursement of a state employee's attorneys fees incurred in defense of charges of misconduct considered and rejected by the State Civil Service Commission would be allowed under R.S. 13:5108.1, we are of the opinion that the reimbursement of a local employee's attorney fees incurred in defense charges of misconduct or considered and rejected by the State Civil Service Commission would be allowed under the rationale employed in our prior opinions extending the allowance for such reimbursement to local employees for civil claims, ethics complaints, etc.¹⁴

Accordingly, it is the opinion of this office that the City may, at its discretion, pay the Police Captain and the Police Chief's attorney's fees provided: (1) the alleged offense(s) arose out of the performance of the police officers' official functions; (2) the investigations did not result in an institution of prosecution; and (3) the City determines that the fees incurred were necessary and reasonable.

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

¹² La. Atty. Gen. Op. No. 83-611.

¹³ *Id. quoting* La. Atty. Gen. Op. 80-105A (emphasis added).

¹⁴ See, e.g., La. Atty. Gen. Op. Nos. 83-611 and 83-475.

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Yours very truly,

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